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In the
Supreme Court of the United States

CHEVY CHASE BANK, FSB., et al.
Petitioners,

v.

DALE WELLS, et al.,
Respondents.

On Petition for a Writ for Certiorari to the Maryland Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT FOR CERTIORARI

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Table of Contents

Page(s)

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

REASONS FOR DENYING THE WRIT 8

I. THE COURT HAS NO JURISDICTION TO REVIEW THE MARYLAND COURT OF APPEALS' INTERLOCUTORY ORDER 8

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT 13

A. THIS COURT HAS HELD THAT FEDERAL PREEMPTION ONLY APPLIES TO POSITIVE STATE LAW REQUIREMENTS, NOT TO STATE LAWS ENFORCING VOLUNTARY CONTRACTUAL PROMISES 13

B. VOLUNTARILY UNDERTAKEN CONTRACTUAL OBLIGATIONS DO NOT SUDDENLY BECOME PREEMPTED MERELY BECAUSE THEY ARE CONTAINED IN A CHOICE-OF-LAW PROVISION 15

C. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *DE LA QUESTA* 17

III. THERE IS NO SPLIT OF LOWER COURT AUTHORITY WARRANTING THIS COURT'S REVIEW 19

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH THE OTS's REGULATIONS 22

V. THIS CASE POSES NO POLICY CONCERNS WORTHY OF THIS COURT'S REVIEW 25

CONCLUSION 29

Table of Authorities

Cases

American Airlines v. Wolens, 513 U.S. 219 (1995) .. *Passim*

Ass'n of Int'l Auto. Mfrs. v. Commissioner, Mass. Dep't of Environmental Protection, 208 F.3d 1 (1st Cir. 2000) 14

Atkinson v. General Electric Credit Corp., 866 F.2d 396 (11th Cir.), *cert. denied*, 493 U.S. 815 (1989) 20, 21

Brown v. Investors Mortgage Company, 121 F.3d 472 (9th Cir. 1997) 21

C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001) 28

Cent. States Health & Welfare Fund v. Pathology Labs., 71 F.3d 1251(7th Cir. 1995), *cert. denied*, 17 U.S. 1233 (1996) 14

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 13

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974) 4, 9-11

Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Ass'n, 577 P.2d 477 (Ore.), *cert. denied*, 439 U.S. 1051 (1978) 25

Fantastic Flakes, Inc., v. Pickwick Intern., Inc., 661 F.2d 479 (5th Cir. 1981) 21

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 6, 17, 18

Flanagan v. Germania, F.A., 872 F.2d 231 (8th Cir. 1989) 24

Florida v. Thomas, 532 U.S. 774 (2001) 11

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997) .. 9, 10

Koynenbelt v. Flagstar Bank, 617 N.W.2d 706 (Mich. App. 2000) 25

Michael v. Shiley, Inc., 46 F.3d 1316 (3d Cir.), *cert. denied*, 516 U.S. 815 (1995) 14

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 28

ProCd, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). 14

Roadway Package System, Inc. v. Kayser, 257 F.3d 287 (3rd Cir.), *cert. denied*, 122 S. Ct. 545 (2001) 19-21, 25

Seigel v. American Savings & Loan Ass'n,
258 Cal. Rptr. 746 (1989) 24

Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998) 21

Tuxedo Beach Club Corp. v. City Federal Savings Bank,
749 F. Supp. 635 (D.N.J. 1990) 24

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468(1989) 6, 16, 17

Williams v. First Gov't Mort. And Investors Corp.,
176 F.3d 497 (D.C. Cir. 1999) 12

Regulations and Statutes

28 U.S.C. § 1257 ..... 4, 8

12 C.F.R. § 560.2 ..... 18, 22, 23

61 Fed. Reg. 1166 12

61 Fed. Reg. 50966 23

Md. Code Ann., Comm. Law I, §12-9 ..... *Passim*

STATEMENT OF THE CASE

Petitioner Chevy Chase, F.S.B. ("Chevy Chase") has issued credit cards to thousands of customers nationwide. Prior to 1996, Chevy Chase had its headquarters in Maryland, where a state usury statute caps credit card and other interest rates at 24%. In its agreements with its card holders ("the Maryland Agreement), Chevy Chase acknowledged this cap and specifically promised that it would "never" raise their interest rates over 24%.

In the Maryland Agreement, Chevy Chase also contracted to amend the Maryland Agreement only "in accordance with applicable law." The contract further specified that it was "governed by Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws." Subtitle 9 requires, *inter alia*, notice of amendments to the cardholder with the opportunity to decline the amendments and terminate the card holder agreement.[1]

In January 1996, Chevy Chase announced in its billing

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[1] Subtitle 9 obligates any credit grantor to provide notice of any proposed amendments to plan provisions regarding interest rates, finance charges, or any other fees charged to its customers, along with a statement that a second notice will be sent in the card holder's next billing statement. Md. Code Ann., Comm. Law I, §12-912(b). The first notice must be sent in an envelope bearing on its face, in 10 point type, a statement "that an important notice of an increase in rates or fees" is enclosed. *Id.* § 12-912(b)(8). The second notice must contain the same substantive information as the first notice and be presented in the same format. *Id.* § 12-912(c)(2). Subtitle 9 also obligates credit grantors to provide card holders notice of their right to refuse to accept new contract terms. *See id.* §12-912(b)(7).

statements that it was officially changing its headquarters to Virginia. It then attempted to replace the Maryland Agreement with a new and different one ("the Virginia Document"). Under the terms of the Virginia Document, interest rates are not subject to a maximum limit. Chevy Chase then raised interest rates well over 24%. The Virginia Document also increased late fees from $15 to $20 and imposed an entirely new $20 penalty if a card holder exceeds his or her credit limit. Chevy Chase did not include any of the statements required by Subtitle 9 in the Virginia Document, the mailing envelope or the billing statement in which it was enclosed, and it did not second the second required notice.

An extensive and undisputed factual record establishes that Chevy Chase buried the notice of this amendment in a manner that ensured that it was not noticed by consumers. A marketing expert testified that the amendments were communicated in a method that was "ineffective from a communications standpoint. In other words, the vast majority of Chevy Chase's card holders were unlikely to notice or become aware of this change to their cardholder agreement." The named plaintiffs also testified that they had never seen the Virginia Document, and evidence of a sample of 136 card holders demonstrated that not a single one of these customers recalled seeing the Virginia Document.

This putative class action was filed in Maryland state court in 1999. The card holder plaintiffs allege that Chevy Chase breached its contracts with its card holders by raising the interest rates above 24% and imposing various other new or higher fees upon the card holders.

After the consumer plaintiffs filed their complaint and discovery requests, the case became bogged down over Chevy Chase's claim that the plaintiff consumer card holders were required to arbitrate their claims. The Maryland Court of Appeals unanimously held that Chevy Chase's contract did not permit it to force plaintiffs into arbitration. *Wells v. Chevy Chase Bank*, 768 A.2d 620 (Md. 2001).

The case was remanded to the trial court for proceedings on the merits. The plaintiffs propounded discovery requests relating to the reasons that Chevy Chase drafted the card holder agreement to refer to Subtitle 9, and Chevy Chase refused to respond on the grounds that the requested information was irrelevant.

Chevy Chase moved to dismiss the entire action on the ground that plaintiffs' claims are preempted by the Home Ownership Lending Act ("HOLA") and the Office of Thrift Supervision ("OTS")'s regulations promulgated under that Act. In connection with its motion to dismiss, Chevy Chase argued that when it had drafted the reference to Subtitle 9 in the card holder agreement, it had only intended that reference to refer to the provisions of Subtitle 9 relating to interest rates, not the provisions of Subtitle 9 relating to the notice to be provided to class members. Chevy Chase offered no evidence to support this statement about its intentions, but reaffirmed its position that it would not respond to discovery on the topic as it was irrelevant.[2] The trial court dismissed the case on the grounds

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[2] In the Petition for Certiorari, Chevy Chase again argues that it have never intended to follow the notice provisions of Subtitle 9. Pet. at 3 n. 1.

that HOLA preempted plaintiffs' contract claims.

The Maryland Court of Appeals reversed the trial court, finding that plaintiffs' breach of contract claims were not preempted. The Court of Appeals noted that the OTS regulations contain an express exemption from preemption for contract actions, App. 22a, and that this Court had rejected the idea that preemption applied to terms voluntarily agreed to in private contracts in *American Airlines v. Wolens*, 513 U.S. 219 (1995). App. 27a. The Court noted that there was no conflict with federal law if Chevy Chase chose to comply with Subtitle 9, App. 35a, and left to the trial court the question of whether Chevy Chase did choose to comply with Subtitle 9 in the contract. App. 42a. Chevy Chase has subsequently moved for summary judgment on that contract interpretation issue. Chevy Chase's brief in support of its motion makes many of the same arguments in support of its position on contract interpretation that Chevy Chase's Petition for *Certiorari* makes in support of its federal preemption arguments.

SUMMARY OF ARGUMENT

The Petition for *Certiorari* should be denied because the decision below is not a final judgment or decree within the meaning of 28 U.S.C. § 1257(a). The decision merely reverses a trial court opinion granting a motion to dismiss, and no state court has yet passed upon the merits of the parties' positions on contract interpretation, class certification, damages or the like. This case falls into none of the four prudential exceptions that that this court recognized to the § 1257(a) finality rule in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1974). This Court should not exercise its jurisdiction over this case on the ground

that Chevy Chase is afraid that at some future point it may lose on its contract defenses in the state court.

Even if the decision below were a final decision, however, this case does not justify a grant of *certiorari*. Chevy Chase claims that the decision below contradicts the decisions of this Court. This Court has directed, however, that federal law does not bar a party from agreeing to follow a state law that would otherwise be preempted, *unless* the promise itself would conflict with federal law. *See American Airlines v. Wolens*, 513 U.S. 219, 228 (1995). In *Wolens*, this Court explained that federal preemption involves the *imposition* of state law upon a party, not obligations voluntarily undertaken. *Wolens*' holding demonstrates that Chevy Chase's real concern is with the interpretation of its contract, because if the plaintiffs are right that Chevy Chase voluntarily chose to promise to comply with all of Subtitle 9, then *Wolens* conclusively establishes that there is no federal preemption. Whether the Maryland courts will agree that Chevy Chase voluntarily chose to comply with Subtitle 9 is yet to be seen.

Chevy Chase argues in its Petition that *Wolens* does not apply, because *Wolens* did not involve a choice-of-law clause. Chevy Chase's proposed distinction of Wolens fails for two reasons. First, it does not respect the Court's underlying rationale – if the choice-of-law provision here can be fairly interpreted under the normal principles of contract interpretation to find that Chevy Chase voluntarily agreed to comply with Subtitle 9, then Subtitle 9 was not "imposed" upon Chevy Chase and there can be no federal preemption. In this case, the specific language of the agreement drafted by Chevy Chase makes such an interpretation reasonable.

Second, this Court has held previously that a party can agree to follow an otherwise preempted state law through the operation of a choice-of-law provision. In *Volt Info. Sciences v. Bd of Trustees*, 489 U.S. 468 (1989), the Court affirmed a state court ruling that a party had agreed in a choice-of-law provision to follow California law even though federal law might have dictated a different result.

Chevy Chase claims that the decision below conflicts with this Court's decision in *Fidelity Federal Savings & Loan Association v. De la Cuesta*, 458 U.S. 141 (1982). *De la Cuesta* is distinguishable on two grounds. First, unlike this case, *De la Cuesta* involved a generic choice-of-law provision that referred generally to the law of a state, but that did not identify any particular state statute. Second, *De la Cuesta* involved a body of state law that conflicted with federal law. This Court noted that an enumerated federal regulation specifically permitted banks to include certain clauses in their contracts, and that the state law that the plaintiffs claimed was incorporated by the generic choice-of-law provision directly conflicted with that regulation. In this case, by contrast, there is no conflict between the purpose or operation of federal law and Chevy Chase giving the sort of notice specified in Subtitle 9.

Chevy Chase argues that this Court should grant *certiorari* because there is a conflict on questions of federal law between the opinion below and several decisions from lower federal courts. In fact, none of the cases cited by Chevy Chase constitute genuine conflicts with the decision below. First, the language of the choice-of-law provision in this case is uniquely specific. Chevy Chase cites to several cases that involve general choice-of-law provisions that refer to all of the laws of

a state, but do not specifically promise to comply with any particular state statute or law. The choice-of-law provision involved in this case, by contrast, specifically identifies by citation a particular state statute that specifies the manner that a credit card issuer must give notice of changes in the terms of an agreement.

In addition, most of the cases cited by Chevy Chase are not based on any discussion of principles of federal preemption, but are merely exercises in the interpretation of contracts. Accordingly, rather than identifying a genuine conflict on principles of law, all Chevy Chase has demonstrated is that different courts interpreting different contracts (that use different language) have reached different conclusions about what the parties to those contracts intended. This hardly justifies the exercise of this Court's jurisdiction.

Third, several of the cases cited by Chevy Chase as conflicting with the opinion below involve contractual promises whose enforcement would have conflicted with the operations and goals of federal law. In this case, by contrast, it would not conflict with federal law for a lender to voluntarily agree to comply with Subtitle 9.

Chevy Chase also claims that the decision of the Court below contradicts the regulations of the OTS, which Chevy Chase claims occupy the field. It is true that OTS has said that its regulations preempt the field, but those regulations include a savings clause that specifically exempts contract claims from this field preemption. Chevy Chase's only response, again, is to assert that the plaintiffs' claims are not really contract claims because it never really intended to promise to follow state law.

Finally, Chevy Chase closes with dire predictions of disaster if the opinion below is not overturned. These predictions, like Chevy Chase's federal preemption theory, arise from the assumption that no honest court could interpret the choice-of-law provision in this case as evidencing an intention to comply with Subtitle 9. Chevy Chase conjures up a grim vision of results-oriented state courts dishonestly misinterpreting contracts in order to circumvent the OTS. *See, e.g.*, Pet. at 7 (expressing fear that state courts will use the 'back door of 'contract interpretation'" to serve their "vested interests.") These attacks upon state courts are insulting and without basis. Indeed, as this opposition will establish, the most reasonable reading of the language of the contract in this case demonstrates that Chevy Chase did promise to and intend to follow all of Subtitle 9.

REASONS FOR DENYING THE WRIT

I. THE COURT HAS NO JURISDICTION TO REVIEW THE MARYLAND COURT OF APPEALS' INTERLOCUTORY ORDER.

The petition should be denied for want of this Court's jurisdiction. Congress has limited this Court's authority to review State-court decisions to those cases where a State court's judgment is final. The jurisdictional statute provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . ." 28 U.S.C. § 1257(a). This provision creates a "firm final judgment rule," under which a State court's decision must be final in two senses to be reviewable: "it must be subject to no further review or

correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997) (citation omitted). Here, the State court's decision below is not final because it rejected Chevy Chase's preemption defense and remanded the case for further proceedings on the merits of the plaintiffs' breach of contract claims. Therefore, this Court does not have jurisdiction to review the State court's decision at this time.

This case does not fall within any of the four prudential exceptions to Section 1257's finality requirement that this Court has recognized. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-85 (1974) (listing and explaining exceptions). First, this is not a case where "the federal issue is conclusive and the outcome of further proceedings preordained." *Id.* at 479. To the contrary, the Maryland Court of Appeals declined to finally answer the contract interpretation question that will determine the merits of the plaintiffs' breach claims, Pet. App. at 35a n.13, and instead remanded the case to the trial court for further proceedings on this and other issues. Pet. App. at 42a. Since the outcome of the state court litigation on the merits of the contract interpretation and breach questions is not preordained, the first *Cox Broadcasting* exception does not apply here.

For largely the same reason, the second exception also does not apply since this is not a case where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480. The federal preemption issue is not guaranteed to survive the State-court proceedings on remand because a ruling for Chevy Chase

on the contract interpretation and breach issues would moot the bank's preemption defense. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. at 82 (finding lack of jurisdiction in part because "[r]esolution of the state-law claims could effectively moot the federal-law question raised here.") Since either the plaintiffs or Chevy Chase could prevail on the state law issues to be litigated on remand, neither of the first two *Cox Broadcasting* exceptions to Section 1257's finality requirement applies here.

Likewise, the third *Cox Broadcasting* exception does not apply because this case does not involve a situation where "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Cox Broadcasting*, 420 U.S. at 481. In *Cox Broadcasting*, the Court described this exception as applying to cases where there are legal impediments that could prevent a party from appealing an adverse judgment, such as in a criminal case where a State would be barred on remand from appealing after an acquittal. *Id.* at 481-82. There are no such legal impediments here because, even if the Maryland courts adhere to the ruling below as "law of the case," that would not bar Chevy Chase from seeking review on the federal issue after there is a final State-court judgment. *See Jefferson v. City of Tarrant*, 522 U.S. at 82-83.

Finally, this is not a case where the fourth *Cox Broadcasting* exception applies. The fourth exception applies in cases where, even though the party seeking review could prevail on the merits on non-federal grounds in the state court proceedings on remand, this Court's immediate review is

nonetheless deemed necessary because "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 482-83. The Court has applied this exception in cases where the federal law issue concerned the proper forum for resolving the merits of a dispute so that delayed review in deference to state court proceedings would effectively erode the federal policy interest at issue regardless of the outcome on the merits. *Id.* at 483 (describing prior case law). The Court has also applied this exception in First Amendment cases, such as *Cox Broadcasting* itself, where the delayed resolution of an "important question of freedom of the press under the First Amendment" would "leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Id.* at 486. At the same time, however, the Court has rejected a state's attempt to invoke this exception in a case involving Fourth Amendment search-and-seizure issues, finding instead that "the State can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions suppressing evidence in criminal trials." *Florida v. Thomas*, 532 U.S. 774, 780 (2001).

The fourth *Cox Broadcasting* exception to Section 1257's finality requirement does not apply here because the federal law question at issue does not implicate the propriety of state court proceedings in this case and does not allege a serious erosion of federal policy. The only imaginable argument that Chevy Chase might propose as to how this case constitutes an erosion of federal policy would be if it would conflict with federal law for Chevy Chase to promise – and then keep its promise – to follow Subtitle 9.

In fact, there is no conflict between the making and keeping of this promise and federal law. Chevy Chase has acknowledged, Pet. at 9, that it could have both promised to follow and actually followed Subtitle 9 without any conflict with federal law. While Chevy Chase asserts that express language was necessary to make such a promise, the existence of a conflict between federal and state law cannot depend upon the presence of any "magic words." In addition, the federal statute relied upon by Chevy Chase, HOLA, does not address how notice must or may be given of credit card contract amendments. Nor do the OTS regulations. In fact, the OTS itself has recognized in the context of home loans that loan adjustments or amendments must be made the subject of lender contracts since they are not the subject of federal laws. "The OTS believes that as long as information about adjustments to interest rates, terms, payment . . . is clearly disclosed to purchasers, the details should be a matter of contract between the savings association and the purchaser." 61 Fed. Reg. 1166 (January 17, 1996). While the Truth in Lending Act ("TILA") imposes some limited requirements upon lenders, there is no question that TILA does not preempt state regulations, much less bar lenders from voluntarily undertaking to exceed its requirements. *E.g. Williams v. First Gov't Mort. & Investors Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999) ("Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; states remain free to impose greater protections for borrowers.")

In sum, it is clear that Chevy Chase's Petition is premature, and that this case is not ripe for this Court's review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

A. THIS COURT HAS HELD THAT FEDERAL PREEMPTION ONLY APPLIES TO POSITIVE STATE LAW REQUIREMENTS, NOT TO STATE LAWS ENFORCING VOLUNTARY CONTRACTUAL PROMISES.

Chevy Chase claims that the decision below conflicts with decisions of this Court. In fact, the decision below is compelled by this Court's decisions that differentiate between obligations that arise as a matter of state *law*, and obligations that arise out of contracts a party has chosen to enter. In *Wolens*, 513 U.S. at 228, this Court distinguished between "state-imposed obligations," and a party's "own self-imposed undertaking,"and held that the latter category of claims were not the subject of federal preemption. "This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to this agreement." *Id. Cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law' within the meaning of [Federal Cigarette Labeling and Advertising Act]."). Plaintiffs' here raise claims based upon what Chevy Chase "itself undertook," and not upon any dictates of the State of Maryland.[3]

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[3] Notwithstanding Chevy Chase's claims of a deep divide in the law, these principles has been regularly followed by the lower courts. *See*

Chevy Chase doggedly refuses to grasp this distinction. It argues, Pet. at 2, that the decision below "imposed [Subtitle 9] on a federal lender." As *Wolens* establishes, however, there is no federal preemption here if *Chevy Chase* chose to voluntarily *impose* these requirements of Subtitle 9 *upon itself.* The only remaining question is one of contract interpretation, because if plaintiffs' contract claims are correct, Chevy Chase chose to draft a contract undertaking to follow Subtitle 9 with respect to notices of amendments to its cardholder agreements. In this case, Subtitle 9 is not a state law or policy "external" to the contract, but is instead – through its incorporation by express reference – a consensual term of the contract.

Michael v. Shiley, Inc., 46 F.3d 1316, 1323 (3d Cir. 1995) (express warranty claims not preempted by Medical Device Amendments of 1976 because they "arise from the representations of the parties which are made the basis of the bargain and do not result from the independent operation of state law. . . .") (citations and footnotes omitted); *Ass'n of Int'l Auto. Mfrs. v. Commissioner, Mass. Dep't of Environmental Protection*, 208 F.3d 1, 7 (1st Cir. 2000) (holding that provisions set forth in a contract are not preempted by Clean Air Act, and noting that "Supreme Court precedents holding that federal preemption is generally confined to formal state laws and regulations and not applicable to contracts and other voluntary agreements"); *ProCd, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996) (holding that enforcement of private contracts relating to computer software is not preempted by Federal Copyright Act and noting that "courts usually read preemption clauses to leave private contracts unaffected"); *Cent. States Health & Welfare Fund v. Pathology Labs.*, 71 F.3d 1251, 1254 (7th Cir. 1995) ("[j]ust as the Federal Aviation Act does not preempt enforcement of contracts that set the effective price of air transportation [citing *Wolens*], so ERISA does not preempt enforcement of contracts that specify who pays how much to whom for medical care").

B. VOLUNTARILY UNDERTAKEN CONTRACTUAL OBLIGATIONS DO NOT SUDDENLY BECOME PREEMPTED MERELY BECAUSE THEY ARE CONTAINED IN A CHOICE-OF-LAW PROVISION.

Chevy Chase seeks to distinguish *Wolens* on the ground that the contract claim in *Wolens* was not based on a choice-of-law provision. Pet. at 5, 10. This distinction fails for several reasons. First, it assumes that Chevy Chase is correct in its contract interpretation argument and that Chevy Chase did not actually intend to comply with Subtitle 9. In fact, it would be entirely reasonable if the state court below were to find that Chevy Chase's specific promise to comply with Subtitle 9 obligated Chevy Chase to do so. Second, this Court has previously affirmed a decision in which a state court held that a party had promised to comply with an otherwise preempted state law by referring to that law in a choice-of-law clause.

Chevy Chase's attempted distinction of *Wolens* is meaningful only if one starts with the assumption that any decision interpreting any choice-of-law decision as obligating a bank to follow an otherwise preempted state law is necessarily illegitimate as a matter of contract law. This assumption is debunked in Part V of this Opposition, below. Where a choice-of-law provision is in fact intended to incorporate an otherwise preempted state law, *Wolens* dictates that federal law does not preempt the application of such a provision.

Chevy Chase argues that *Wolens* does not apply here, because *Wolens* distinguished between contractual obligations and "policies external to the agreement." Pet. at 10, citing

Wolens, 513 U.S. at 233. Chevy Chase assumes that in the context of this case, Subtitle 9 is a "policy external to the agreement," rather than an actual term of the agreement. There is no support in *Wolens* for this assumption, however. The context of the passage is a sentence discussing "[t]his distinction between what the State dictates and what the airline itself undertakes. . . ." *Id.* at 233. This Court was distinguishing between obligations that are external to the contract and are imposed by a state through a statute, regulation or judicial decision, and obligations that arise through a party's self-imposed undertaking. In short, the reasoning that underlay the Court's decision in *Wolens* is just as applicable to contractual obligations voluntarily undertaken in a choice-of-law provision as it is to obligations undertaken in language that expressly enumerates those obligations.

In addition, this Court has rejected Chevy Chase's argument that no choice-of-law provision can ever be found to obligate a party to follow state law rather than federal law. In *Volt Info. Sciences*, 489 U.S. 468, this Court gave effect to a choice-of-law provision in an arbitration agreement which stated that the contract would be governed by the law of the "place where the Project is located." The question in *Volt* was whether the contract at issue should be governed by the California Arbitration Act, which contains a provision allowing a court to stay arbitration pending resolution of related litigation, or by the Federal Arbitration Act ("FAA"), which does not contain any provision regarding arbitration stays. *Id.* at 470-72. Absent the choice-of-law provision, the contract would have been governed by the terms of the FAA. This Court affirmed the lower court's finding that the choice-of-law provision rendered the contract subject to the stay provisions of

the California statute. This result cannot be squared with Chevy Chase's theory that choice-of-law provisions may never obligate a party to comply with otherwise preempted state laws. Indeed, this case goes one step better than *Volt*, insofar as the cardholder agreements at issue here contain a highly specific reference to a particular provision of state law, rather than a vague reference to the "law of the Place."[4]

C. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *DE LA QUESTA*.

Chevy Chase argues that this Court must find that plaintiffs' claims are preempted due to this Court's decision in *de la Cuesta*, 458 U.S. 141. The preemption analysis of *de la Cuesta* has no bearing here, however, as the facts of that case are readily distinguishable from this one. First, *De la Cuesta* involved a generic choice-of-law provision that did not refer to or cite any particular state law. Second, *De la Cuesta* involved a direct conflict between a state law that prohibited due-on-sale clauses in mortgage agreements and an OTS regulation that explicitly permitted such clauses and expressly preempted any contrary state law. *See id.* This Court held that the federal regulation preempted application of the California law, stating that "state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with

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[4] This Court also directed in *Volt* that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." 489 U.S. at 474. The only exception that this Court noted was where a state contract interpretation might interfere with federal rights, an exception that does not apply here.

federal and State regulations is a physical impossibility.'" *Id.* at 152. In this case, as set forth above, there is no physical impossibility or other conflict.

Chevy Chase argues that it does not matter that the conflict preemption analysis of *de la Cuesta* does not apply here because there is preemption under a different theory – that HOLA and the OTS regulations preempt the entire regulatory field. This argument is without merit. Even if one assumes that the OTS regulations preempt the field,[5] that preemption only extends to state *laws*, meaning state-imposed obligations. *See, e.g.*, Section 560.2(a). The OTS regulations specifically exclude claims based upon state contract law. 12 C.F.R. § 560.2(a). This exception draws the same distinction that this Court did in *Wolens* between obligations that are "externally" imposed upon lenders by state law, and those obligations that are "self-imposed undertakings."

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[5] In fact, this Court did not hold that this field is preempted in *de la Cuesta*. *See id.* at 159 n.14 ("[b]ecause we find a direct conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation."); *id.* at 171-72 (O'Connor, J., concurring). In addition, the OTS's Chief Counsel has advised that HOLA does not preempt traditional contract law. OTS Op. Chief Counsel (December 24, 1996).

III. THERE IS NO SPLIT OF LOWER COURT AUTHORITY WARRANTING THIS COURT'S REVIEW.

No other court in the U.S. has examined the question faced by the Court below: does federal law bar a savings bank from promising to follow a state statute through a very specific choice-of-law clause that identifies that particular state statute by its citation, where it would not conflict with federal law for the bank to perform the acts set forth in the statute. Nonetheless, Chevy Chase claims that the decision of the Maryland Court of Appeals in this case conflicts with a number of decisions by lower federal courts. In fact, not one of the cases cited by Chevy Chase conflicts with the decision below. Each of the cases cited by Chevy Chase is readily distinguishable on at least one of two grounds.

First, the terms of the choice-of-law provisions involved in the cases cited by Chevy Chase are different in a number of respects from the contract involved in this case. In case after case cited by Chevy Chase, the contracts contained a "generic" choice-of-law clause – a clause referencing state law generally, without specifying precisely which provision or subchapter of state law is to be incorporated into the contract.

Chevy Chase repeatedly cites the case of *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287 (3rd Cir.), *cert. denied*, 122 S. Ct. 545 (2001), for example, as an illustration of a case that conflicts with the decision below. Pet. at 13, 17, 19 and 21. The contract in *Roadway* stated that the agreement "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania." 257 F.3d at 290.

The Court held that "the presence of a generic choice-of-law clause tells us little (if anything) about whether contracting parties intended to opt out of the [federal statute's] default standards and incorporate ones borrowed from state law . . .." Accordingly, the Court held that the parties had not intended to incorporate state law on the question. In this case, by contrast, Chevy Chase's cardholder agreement contains a highly specific reference to "Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code." Unlike the generic reference to "the laws of the Commonwealth of Pennsylvania" at issue in *Roadway*, there is no ambiguity about the promise to comply with Subtitle 9.

This distinction is decisive. Far from conflicting with the opinion below, *Roadway* strongly supports the conclusions of the Maryland Court of Appeals. The Third Circuit recognized that a *specific* reference to a particular state statute in a contractual choice-of-law provision *should* be given full force and effect notwithstanding contrary standards set forth in a federal statute. *See id.* at 297 (noting that, if the contract at issue had stated that "any controversy shall be settled by arbitration in accordance with the terms of the Pennsylvania Uniform Arbitration Act," then the standards of the Pennsylvania law would have displaced the FAA's default standards). The Governing Law provision of Chevy Chase's cardholder agreement meets precisely the standard for specificity that the Third Circuit said was necessary to create a binding obligation. Accordingly, *Roadway* confirms the conclusion of the Court below.

This same point can be made in nearly all of the cases cited by Chevy Chase. In *Atkinson v. General Electric Credit*

Corp., 866 F.2d 396 (11th Cir.), *cert. denied*, 493 U.S. 815 (1989), Pet. at 12-13, for example, the contractual choice-of-law provision merely stated that the contract would be governed by the laws of Georgia. No specific state statute was enumerated. *Brown v. Investors Mortgage Company*, 121 F.3d 472 (9th Cir. 1997), Pet. at 12, is factually indistinguishable from *Atkinson* and has no bearing here for the same reasons. Similarly, in *Fantastic Flakes, Inc., v. Pickwick Intern., Inc.*, 661 F.2d 479 (5th Cir. 1981), Pet. at 12, 13, 17 and 21, the choice-of-law provision did not reference any particular state laws, but referred vaguely to "the laws of [a particular state]."

The importance of the contract language is highlighted by the fact that most of the cases cited by Chevy Chase do not turn upon questions of federal preemption or other issues that even arguably justify this Court's review, but are instead simply cases involving questions of contract interpretation. As the Third Circuit stated in *Roadway*: "The issue before us . . . is not one of choice-of-law or preemption – it is simply a matter of contract construction." 257 F.3d at 294. The Court added that it is wrong "to focus on preemption rather than contract construction." *Id.* at 296 n.4. The decision in *Atkinson*, similarly, turned upon the court' s conclusion that "a more reasonable interpretation of the contract is that the choice-of-law provision was intended to govern contract matters not covered by" federal law. *Id.* at 398 (emphasis added).

Second, several cases cited by Petitioner are distinguishable on the ground that a defendant's promise to follow the state law at issue would have conflicted with the goals and operation of federal law. Chevy Chase claims, for example, that the decision below conflicts with *Smith v.*

Comair, Inc., 134 F.3d 254 (4th Cir. 1998). In *Smith*, an airline passenger forgot his drivers' license and was not permitted to board a plane. The passenger then sued the airline for breach of contract, false imprisonment and other claims. The Fourth Circuit noted that "Smith's failure to produce identification implicated the safety concerns of both the [Airline Deregulation Act ("ADA")] and the FAA directive. Because Smith's contract claim is based upon Comair's refusal to permit him to board, it directly implicates the airline's discretion and/or duty under federal law. Accordingly, the contract claim is preempted under the ADA." 134 F.3d at 258. In this case, by contrast, there is no conflict with federal law, as set forth in Part I above.

IV. THE DECISION BELOW IS NOT IN CONFLICT WITH THE OTS's REGULATIONS.

Chevy Chase argues that the decision below conflicts with the regulations of the OTS. In fact, those regulations make clear that there is no basis to sweep away consumer claims of the sort raised by plaintiffs here.

The OTS regulations contain a savings clause that *expressly preserves* state "contract and commercial law" from federal preemption. The regulations governing applicability of state law begin by stating that "OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation," 12 C.F.R. § 560.2(a), except to the extent that a lender chooses to obligate itself by contract. In other words, the "flexibility" that OTS seeks to protect includes the flexibility for a lender to voluntarily promise to follow state laws.

Paragraph (c) of the regulations in turn provides that:

> State laws of the following types *are not preempted* to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:
>
> *(1) Contract and commercial law;* [and] . . .
>
> (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

12 C.F.R. § 560.2(c). As the italicized language makes clear, state contract law is expressly *excluded* from the preemptive scope of HOLA and the OTS regulations except to the extent that such law is otherwise inconsistent with the purposes of 12 C.F.R. § 560.2(a). *See also* 61 Fed. Reg. at 50966 ("OTS wants to make clear that it does not intend to preempt basic state laws such as state uniform commercial codes and state laws governing real property, contracts [or] torts . . . .").

Chevy Chase seeks to evade this Savings Clause with the same gambit it uses to ignore this Court's decision in *Wolens*. Chevy Chase argues that the paragraph (c) Savings Clause for contract causes of action is limited to contractual provisions that mimic state law, rather than incorporate state

law by reference. Pet. at 21. A contractual provision that incorporates state law by reference, according to Chevy Chase, is exempted from this Savings Clause and is preempted.

This odd and formalistic defense finds no support in the language of paragraph (c) itself, however, and no known authority supports it. The evident purpose of the Savings Clause is to permit lenders to craft agreements as they will, but then to allow borrowers to hold lenders to those agreements if they breach them. This applies just as strongly to contractual promises that incorporate obligations by reference as to contractual promises that mimic the obligations through language. Holding parties to their promises, whatever those may be, requires precisely the kind of traditional infrastructure of state law that undergirds commercial consumer transactions and that paragraph (c) is designed to save from preemption. There is an exception for contractual promises that conflict with the purposes of federal law, but this does not apply here, as was established in Part I above.

In keeping with the OTS's own position on the matter, numerous courts have held that neither HOLA nor its implementing regulations preempt common-law contract, tort, and consumer protection claims that do not otherwise conflict with OTS's regulatory scheme. *See, e.g., Flanagan v. Germania, F.A.*, 872 F.2d 231, 234 (8th Cir. 1989) (claim for tortious interference with contract not preempted by HOLA); *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F. Supp. 635, 648 (D.N.J. 1990) (private right of action under state consumer protection law not preempted by HOLA); *Seigel v. American Savings & Loan Ass'n*, 258 Cal. Rptr. 746, 748-53 (1989) (permitting state-law claims for unfair competition and

breach of contract); *Koynenbelt v. Flagstar Bank,* 617 N.W.2d 706, 712-14 (Mich. App. 2000) (HOLA does not preempt common-law tort and contract claims); *Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 577 P.2d 477, 481-88 (Ore.), *cert. denied*, 439 U.S. 1051 (1978) (applying state common-law restitutionary principles to loan-related activities of federal lenders).

Chevy Chase argues that a recent opinion letter from the OTS requires a contrary conclusion. Pet. at 13-14. The choice-of-law provision discussed in that letter makes only a general reference to the law of New York, however, rather than specifically citing to any specific state law or statute. App. 106a. The question posed in the letter is whether this language "establish[es] a contractual agreement," appearing to constitute a recognition that if the language had formed a valid contract that it would not have been preempted. The OCC letter is thus as readily distinguishable as cases cited by Chevy Chase such as *Roadway Packaging*.

V. THIS CASE POSES NO POLICY CONCERNS WORTHY OF THIS COURT'S REVIEW.

Chevy Chase and its *amici* suggest that this Court should grant *certiorari* because state courts seeking to expand the scope and power of state authority will seize upon the decision below to do so. This purported fear is unfounded for two reasons. First, the language of the choice-of-law provision here is quite unusual, so the decision below will not have any impact upon most choice-of-law provisions. Second, Chevy Chase's premise is that it would be a misinterpretation of the contract for any court to read its choice-of-law clause as a

promise to comply with the notice provisions of Subtitle 9. A building block of Chevy Chase's argument is its assertion that it promised to comply with Subtitle 9 for reasons that had nothing to do with the notice requirements included in Subtitle 9. Pet. at 3, n. 1. This assertion is unjustified, and this Court need not exercise its jurisdiction to guard against the possibility that the state courts may eventually agree with that conclusion..

The notion that the choice-of-law provision involved in this case is indicative of choice-of-law provisions generally is belied by key evidence submitted by Chevy Chase's own *amici*. The *Amicus* Brief of the American Bankers Association, et al., dramatically illustrates how uniquely specific the language in Chevy Chase's choice-of-law provision is, and thus how unlikely it is that the decision below will affect the results in many other cases. That brief provides, at 6-7 n. 3, six exemplars of choice of law provisions found in other credit card agreements. Each of those provisions refers generally to the laws of one state or another, and not one of those provisions mentions (much less provides a specific citation to) any particular state statute dealing with the notice to be provided by credit card issuers to their card holders.

Similarly, Chevy Chase's premise that no honest court could read the choice-of-law provision involved here as requiring Chevy Chase to comply with the notice provisions of Subtitle 9 is wrong. This Court should not exercise its jurisdiction to resolve a dispute about how the peculiar contract language at issue here should be interpreted. Since the Petition depends upon the assumption that Chevy Chase is right about this merits issue, however, this Opposition will summarize some of the main reasons why it would be entirely reasonably

(and hardly a power grab by state courts) for the state court to interpret this contract as a promise to comply with Subtitle 9.

First, Chevy Chase itself acknowledges that the choice-of-law provision was intended to incorporate part of Subtitle 9 into its contract – the part of Subtitle 9 that involves interest rates. This admission is inconsistent with and disproves its later claim that such laws could never be incorporated into a cardholder agreement by reference. In essence, Chevy Chase's position amounts to this: "Federal law preempts the conclusion that a lender has agreed to follow any state law referred to in a choice-of-law provision, except for state laws that the lender chooses to follow once a dispute arises."

Second, Chevy Chase's assertions about its intention to incorporate part, but not all, of Subtitle 9 into the contract are contrary to the language of its contract. The actual language of the choice-of-law clause states that Chevy Chase would follow:

> Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code and applicable federal laws. E. 78.

Chevy Chase would like this Court to assume that the only reasonable way for a court to interpret this provision would be to instead pretend that it reads as follows:

> **Those parts of** Subtitle 9 of Title 12 of the Commercial Law Article of the Maryland Annotated Code **that relate to usury, but not other parts of that Subtitle such as the ones that relate to giving adequate notice**

of changes to cardholder agreements, and applicable federal laws.

The decision of the Court below that the trial court might refuse to reach this interpretation is hardly evidence of some power grab by state courts. Chevy Chase was free to have drafted this contract of adhesion as it wished, and it could have written the choice-of-law provision to limit itself to the provisions of Subtitle 9 that relate to interest rates.

Chevy Chase's proposed interpretation of the card holder agreement also ignores the well-established rule of contract interpretation that more specific promises (such as a promise to comply with Subtitle 9) will govern over more general promises (such as a general promise to comply with applicable federal laws). *E.g. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). Chevy Chase also asks this Court to assume that the contract should be interpreted in favor of the drafting party, an assumption that this Court has rejected on many occasions. *E.g., C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) ("In appropriate cases, this Court applies the common law rule of contract interpretation that a court should construe ambiguous language against the interests of the party that drafted it.") If the state court goes on to apply these doctrines to the plain language of Chevy Chase's choice-of-law provision, that will not be proof of some abuse of power by state courts.

Finally, this Court should not credit the unsupported assertions Chevy Chase offers in the Petition to the effect that it never intended to follow the provisions of Subtitle 9 relating to the notice to be given to card holders. Pet. at 3 n. 1. Chevy

Chase offers no record citation to any evidence supporting its claims of purpose. In fact, Chevy Chase refused to respond to any discovery requests relating to its purposes until after the motion to dismiss was resolved. Having refused to produce any evidence on this issue, it is inappropriate for Chevy Chase to ask this Court to assume that the contract language at issue was intended in a certain way. Even if it were an appropriate use of this Court's jurisdiction to resolve questions of contract interpretation, it should hardly do so based upon bald assertions of one party's intent that are not supported by any record evidence.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for *Certiorari*.

Respectfully submitted,

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